

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIGUEL GONZALEZ,

Defendant-Appellant.

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UNPUBLISHED

April 12, 2007

No. 267568

Wayne Circuit Court

LC No. 05-007734-01

Before: Neff, P.J., and O’Connell and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 6 to 25 years’ imprisonment for the armed robbery conviction, and two years’ imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that his counsel’s failure to call two purported alibi witnesses to the stand constitutes ineffective assistance of counsel. We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel. *LeBlanc, supra* at 579. The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *LeBlanc, supra* at 579.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different, and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578; *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel’s performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The

failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court will not substitute its judgment for that of counsel in a matter of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant argues that he was denied the effective assistance of counsel when his counsel failed to call defendant's mother, Catherine Gonzalez, and defendant's sister, Lucinda Gonzalez, as alibi witnesses. Pursuant to the Michigan Code of Criminal Procedure, a trial court must exclude alibi evidence when a defendant fails to comply with MCL 768.20(1), the notice-of-alibi statute. MCL 768.21. Here, defense counsel only filed the requisite notice of alibi with respect to defendant's mother, not defendant's sister. Consequently, defense counsel was precluded from calling defendant's sister to testify. MCL 768.21. To the extent that defendant is arguing that his counsel was ineffective for failing to file an alibi notice concerning defendant's sister, there is nothing in the lower court record to suggest that defendant's sister could have provided defendant with an alibi. Although defendant attaches to his appellate brief the affidavits of his sister and mother, the affidavits are not a part of the lower court record and, therefore, cannot be considered. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Given that there was no evidentiary hearing on the matter and nothing concerning defendant's sister nor what her alleged testimony would have been, there are no mistakes apparent on the record with respect to counsel's failure to call defendant's sister as an alibi witness. Thus, defendant is unable to establish an ineffective assistance of counsel claim as it relates to the purported alibi testimony of defendant's sister.

Regarding defendant's mother, a notice of alibi was filed and reference to defendant's mother appears in the lower court record. Although counsel was aware that defendant's mother could have provided defendant with an alibi, counsel never called defendant's mother as a witness. The failure to call a supporting witness does not inherently amount to ineffective assistance of counsel, and there is no "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998).

During his opening statement, defense counsel only indicated that he "may" call defendant's mother to testify on behalf of defendant. A review of the record reveals that the crux of counsel's strategy did not involve defendant's mother's purported alibi testimony, but rather, involved undercutting the credibility of the prosecution's witnesses who identified defendant as one of the assailants. Defense counsel took care to extensively cross-examine the prosecution's witnesses with an eye toward discrediting them. Counsel elicited testimony from Alfie Parker, one of the prosecution's main witnesses who identified defendant as his assailant, that Parker took drugs on the day of the incident, was a drug dealer, had animosity toward defendant, lied to police when he was interviewed after the incident, and attempted to burn down the house of Clifford Sabin, another of the assailants, in retaliation for Sabin burning down Parker's house. With regard to another of the prosecution's main witnesses, Mary Garcia, defense counsel elicited testimony from Garcia that her trial testimony differed greatly from a prior statement she had given to police on the night in question.

The decision to abstain from calling defendant's mother to the stand appears to have been purposeful. Counsel was able to call defendant's mother to the stand if he wished, given that he fulfilled the relevant statutory requirements by filing a notice of alibi listing defendant's mother as a proposed witness. Further, it is clear that counsel was aware of defendant's mother's

purported testimony given his reference to it in his opening statement. The failure to call an alibi witness does not constitute ineffective assistance of counsel if counsel believes that the purported alibi witness could not provide an effective alibi. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995). Defendant's mother's purported alibi testimony might not have been effective given that allowing defendant's mother to testify would have been a risky proposition. Had defendant's mother's credibility been called into question, which, presumably, the prosecution would have at least attempted to do, the progress defense counsel had made in discrediting the prosecution's witnesses would have been seriously undermined. If defendant's mother was perceived to be lying about defendant being at home with her at the time of the incident, the jury would likely conclude that the prosecution's witnesses who identified defendant as the assailant were credible after all. It appears that counsel's decision to focus on discrediting the prosecution's witnesses and not presenting his own witnesses and running the risk of having them discredited was effective in that defendant was acquitted of two counts of assault with intent to murder. To the extent that his strategy was unsuccessful in that it failed to garner defendant an acquittal on all charges, that a trial strategy is ultimately unsuccessful does not render counsel ineffective for using it. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Accordingly, defendant has failed to establish that his counsel provided him with ineffective assistance.

Second, defendant contends that the trial court erred when it failed to extend the prior inconsistent statement jury instruction to both of the witnesses who testified regarding making prior inconsistent statements, rather than just to the one. We disagree.

Defense counsel neither requested an instruction concerning prior inconsistent statements, nor did he object to the lack of instruction. Rather, defense counsel affirmatively expressed approval of all of the jury instructions. Defendant's affirmative statement indicating his satisfaction with the jury instructions constitutes express approval of the instructions and waives review on appeal. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004) (one who waives his rights may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error).

Affirmed.

/s/ Janet T. Neff  
/s/ Peter D. O'Connell  
/s/ Christopher M. Murray